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No. 86-245

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

HUMBOLDT BAY MUNICIPAL WATER DISTRICT,

Petitioner,

vs.

LOUISIANA-PACIFIC CORP.; SIMPSON TIMBER CO.; SIMPSON PAPER CO.; CROWN ZELLERBACH CORP.; AND HUMBOLDT BAY PULP CO.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BEST AVAIL

QUESTION PRESENTED FOR REVIEW

Can a reasonable inference of a conspiracy in restraint of trade be drawn from undisputed evidence that (a) petitioner calculated long-term water rates and drafted identical contracts for respondents, (b) petitioner insisted that all negotiations be conducted simultaneously with both respondents and that the contracts must remain identical, (c) petitioner became dissatisfied with the rates which it had calculated and requested that respondents jointly consider its proposals to increase the rates voluntarily, (d) respondents considered the proposals and declined to increase the rates, (e) petitioner ultimately declared the rate provisions ultra vires under state law, and purported to raise the rates unilaterally, and (f) the

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state appellate court disagreed with petitioner and twice held the contracts valid under state law.

STATEMENT REQUIRED BY SUPREME COURT RULE 28.1

Respondent Simpson Timber Company's parent company is Simpson Investment Company. Simpson Timber Company has no affiliates or subsidiaries other than wholly owned subsidiaries. Respondent Simpson Paper Company is a subsidiary of Simpson Timber Commpany and has no affiliates or subsidiaries other than wholly owned subsidiaries. Respondent Humboldt Bay Pulp Company is a subsidiary of Simpson Paper Company and has no affiliates or subsidiaries.

Respondent Crown Zellerbach Corporation's parent company is James River Corporation of Virginia. Crown Zellerbach Corporation has no affiliates or subsidiaries other than wholly owned subsidiaries.

Respondent Louisiana-Pacific Corporation has no parent company and has no affiliates or subsidiaries other than wholly owned subsidiaries.

TABLE OF CONTENTS

	Page
Preliminary Statement	1
Opinions Below	3
Statement of the Case	3
Reasons for Denying the Writ	10
I. The decisions below correctly applied the well-established summary judgment standards ...	11
II. The lower courts correctly applied the antitrust precedents of this Court to the undisputed facts	14
1. There is no per se claim	16
2. There is no genuine issue under the rule of reason	19
Conclusion	24

TABLE OF AUTHORITIES

Pages

Cases

Arizona v. Maricopa County Medical Society, 457 U.S. 332 ..... 17, 18

Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 ..... 17, 18

F.T.C. v. Indiana Federation of Dentists, ___ U.S. ___, 106 S.Ct. 2009 21

Louisiana-Pacific Corp. v. Humboldt Bay Mun. Water District, 137 Cal.App.3d 152, 186 Cal.Rptr 833 9

Matsushita Elec. Indus. Co. v. Zenith Radio, ___ U.S. ___, 106 S.Ct. 1346 ..... 11, 12, 13

National Soc. of Professional Engineers v. U.S., 435 U.S. 679 21

Perma Mufflers v. Int. Parts Corp., 392 U.S. 134 22

Sugar Institute v. United States, 297 U.S. 553 18

United States v. General Motors, 384 U.S. 127 19

Pages

Statutes

United States Code
Title 15, section 1 2
Title 15, section 15(b) 7

Rules

Federal Rules of Civil Procedure
Rule 56(c) 11

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PRELIMINARY STATEMENT

Petitioner has become dissatisfied with the long-term rates which it previously calculated in its water supply contracts with respondents. After respondents declined to pay more

than required by contract, the validity of petitioner's contractual obligations was litigated in state court. Petitioner ultimately lost. It then brought an action in federal court, restyling its claim as a conspiracy between respondents to fix and maintain the contract rates. After extensive discovery, the district court correctly determined that a conspiracy in violation of section 1 of the Sherman Act (15 U.S.C. § 1) could not reasonably be inferred from respondents' refusals to pay more than required by contract. In making that determination, the district court relied on the undisputed facts (1) that petitioner--not respondents--set the rates in identical contracts which it drafted, and (2) that thereafter--in order to keep the contracts identical--petitioner insisted that all contract negotiations be conducted

simultaneously and that respondents jointly discuss petitioner's contract proposals.

OPINIONS BELOW

The district court's opinion is reported at 608 F.Supp. 562. In a one-sentence unpublished order, the Court of Appeals for the Ninth Circuit affirmed (see 757 F.2d 597).

STATEMENT OF THE CASE

Petitioner's statement of the case contains assertions contrary to the record and material omissions. The relevant facts and procedural history are as follows:

Petitioner municipal water district was formed in 1956 to attract one or more wood pulp mills-- which require a large and constant supply of water--to locate in Eureka, California

(Pet.Appx., p. A-2). In 1959, the predecessor to respondent Louisiana-Pacific Corporation ("L-P") accepted petitioner's offer of a long-term water supply contract at a fixed, sliding-scale rate. Sometime later, respondent Simpson[1] agreed to the same proposal (Pet.Appx., p. A-3). Petitioner drafted identical 40-year water supply contracts which were executed by Simpson and L-P in 1959 (ibid.). As planned, Simpson and L-P constructed pulp mills in Eureka, and petitioner constructed water supply facilities.

From the beginning, petitioner has interpreted California law to

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1 For convenience, respondents Simpson Timber Company, Simpson Paper Company, Crown Zellerbach Corporation and Humboldt Bay Pulp Company are collectively referred to herein as "Simpson."

require that the rates and all other terms in respondents' contracts must be identical (Pet.Appx., p. A-3). The contracts were amended identically in 1966 and 1975, each time following lengthy, and at petitioner's insistence, simultaneous negotiations with both respondents (Pet.Appx., p. A-4). To keep the contracts uniform, petitioner sent numerous joint letters to respondents, sometimes expressly requesting a mutually acceptable contract proposal.[2]

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2 Petitioner's correspondence to respondents over the years illustrates the consistent pattern (citations are to the clerk's record ("C.R.") in the court below; emphasis supplied throughout):

> ----In 1962, petitioner wrote to respondents: "if you both agree, the district at this time would be willing to furnish you water from its pipeline" (C.R. 130, Exh. 26).

(Footnote Continued)

This pattern governed the parties' contractual relationships during the 18-year period, 1959 until

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(Footnote Continued)

> ----In 1966, petitioner wrote to Simpson's attorney, "If you and [L-P's attorney] can agree upon the means of making this amendment, and submit an acceptable text" (C.R. 251, Exh. 57, p. 2).
>
> ----In 1974, petitioner established a schedule for consideration of its latest contract proposal, including that respondents "will have a joint meeting on June 19 to review the proposed contract changes" (C.R. 251, Exh. 60, p. 1).
>
> ----In 1976, petitioner solicited "a proposal" from "the pulp mills" (C.R. 251, Exh. 62, p. 3).

There are literally dozens of similar letters containing explicit or implicit requests by petitioner that respondents confer (C.R. 251, Exh. 44 (collecting letters)). Petitioner has never questioned the authenticity of these documents or that they accurately reflect petitioner's intent.

1976, discussed by petitioner.[3] It is undisputed that throughout that period petitioner knew respondents were meeting together in compliance with its repeated requests. Petitioner never objected (C.R. 130: Exh. 4, p. 18; Exh. 5, p. 91; Exh. 6, p. 108; and Exh. 34, pp. 36-37). Similarly, petitioner refused to amend one contract without the other, insisted on joint negotiations with both respondents and never requested separate negotiations.[4] Then, in 1977, in the

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3 The "facts" section in the petition's statement of the case ends with an event from 1976 (Pet., p. 5). Petitioner filed this action in November 1983. Respondents advanced the four-year statute of limitations (15 U.S.C. § 15b) as an alternative grounds for summary judgment below. The lower courts, however, did not reach the issue.

4 Early on, counsel for petitioner explained: "In the Simpson and [L-P] contracts, the District [petitioner]

(Footnote Continued)

face of a claimed "mounting fiscal crisis" (Pet., p. 4), petitioner passed "Ordinance No. 10," which declared its contracts to be ultra vires under state law and purported unilaterally to increase the rate structure (Pet.Appx., p. A-4).

Respondents brought separate actions in state court, seeking declaratory relief as to the validity of their respective contracts with petitioner. The California Court of Appeal

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(Footnote Continued)

undertakes to treat both Corporations the same." To allow L-P to amend its contract separately "would open up the Simpson contract for renegotiations. This, of course, the Directors [of petitioner] are not willing to do" (C.R. 130, Exh. 19, pp. 1-2) (emphasis added). Years later, L-P suggested that petitioner meet with L-P to discuss the petitioner's requested rate increase. Petitioner responded that unless Simpson were present, "such discussion would probably be fruitless" (C.R. 130, Exh. 38, p. 1) (emphasis added).

ultimately determined that those contracts, including the price term, were valid:

> "District [petitioner] was formed with the express purpose of inducing appellants [respondents] to locate within its area. To that end, District entered into the agreements here in issue in order to bind appellants [respondents] to a firm obligation to purchase a specified amount of water and thereby obtained for itself the benefit of a long-term guarantee of patronage. District is bound to the obligation to which it agreed in order to obtain that guarantee" (Louisiana-Pacific Corp. v. Humboldt Bay Mun. Water District (1982) 137 Cal.App.3d 152, 162, 186 Cal.Rptr. 833, 840).

In 1983, having lost on its contract theory, petitioner sought leave to file a cross-complaint to assert for the first time, some 25 years after their execution, that the 1959 contracts were the result of a conspiracy by respondents to fix prices and restrain

trade (C.R. 53, Exhs. 5 and 6). The state trial court granted the motion, but the California appellate court issued a writ of mandate, holding that its prior opinion had determined that the contracts in question were valid under state law and binding on petitioner, and that therefore final judgment should be entered for respondents (C.R. 53, Exh. 8). In November 1983, petitioner filed this action in federal court, asserting the identical claims under the Sherman Act.

REASONS FOR DENYING THE WRIT

This case presents no novel issue, no conflict with decisions of this Court, nor any other matter worthy of this Court's attention. The Ninth Circuit disposed of the issues presented on appeal in a one-sentence summary affirmance adopting the reasons "ably

stated" by the district court (Pet.Appx., p. A-1). This case involves the routine application of well-established summary judgment standards to a meritless claim of antitrust conspiracy.

I. THE DECISIONS BELOW CORRECTLY APPLIED THE WELL-ESTABLISHED SUMMARY JUDGMENT STANDARDS.

Last term, in Matsushita Elec. Indus. Co. v. Zenith Radio (1986) ___ U.S. ___, 106 S.Ct. 1346, this Court reiterated "the standard district courts must apply when deciding whether to grant summary judgment in an antitrust conspiracy case," namely that, when a moving party has carried its burden under Rule 56(c) of demonstrating that no genuine issue of material fact exists,

> "its opponent must do more than simply show that there is some metaphysical doubt as to

> the material facts. In the language of the Rule, the non-moving party must come forward with 'specific facts showing that there is a genuine issue for trial.' Fed.Rule Civ.Proc. 56(e) (emphasis added)" (106 S.Ct. 1356) (citations omitted).

The district court correctly applied these "settled principles" here.

The undisputed facts, construed most favorably to petitioner, show only that petitioner (not respondents) insisted that there be identical contracts, that petitioner prepared those contracts and calculated the rates, and that it thereafter insisted that all amendments also be identical. In the course of the contract negotiations, respondents--at petitioner's express request--communicated about petitioner's contract proposals. This evidence cannot support a reasonable inference of conspiracy. As this Court observed in Matsushita:

> "[A]ntitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case. * * * [C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy" (106 S.Ct. 1357) (emphasis added).

Respondents' acquiescence in the demands of their common supplier (petitioner) for simultaneous negotiations and consultations between them is certainly at least "as consistent with permissible competition as with illegal conspiracy" (ibid.). Under the circumstances, consultation between respondents was inevitable (see pp. 4-7, supra). The district court correctly held that the evidence construed most favorably to petitioner could not support a reasonable inference of conspiracy.

II. THE LOWER COURTS CORRECTLY APPLIED THE ANTITRUST PRECEDENTS OF THIS COURT TO THE UNDISPUTED FACTS.

Petitioner's grievance sounds in contract, not antitrust. Petitioner seeks to relitigate in this Court the validity under state law of its long-term contracts, asserting that respondents have refused to modify their contracts "in derogation of [petitioner's] contractual rights and statutory obligations" (Pet., p. 2). Thus, petitioner's antitrust theory is premised on respondents' refusal to recognize petitioner's discredited contract claims (i.e., an asserted obligation under state law to pay "compensatory" rates and an asserted state law "equitable right" to reform the contract rates). The California Court of Appeal, however, has twice rejected these very claims:

> "[W]e intended [in the first appellate opinion] to inform the trial court that the District [petitioner] was bound by the contracts it had entered with [respondents], and that [any further proceedings] should be litigated in light of this fact" (C.R. 53, Exh. 8, p. 9) (emphasis added).

Therefore, the rates are valid under state law, and respondents were and are entitled to rely on them. Petitioner's stubborn insistence on disproved contractual rights cannot alter the preclusive effect of the state court judgment entered against it on those very issues.[5] Likewise, the placing of

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5 In November 1984, petitioner moved for relief from the state court judgments entered against it pursuant to the writ of mandate. The trial court denied the motion. Not satisfied, petitioner appealed, claiming that the judgments which the appellate court had ordered to be entered were the result of a "mistake." On August 21, 1986, the California Court of Appeal ordered

(Footnote Continued)

the words "conspired," "collusive" or "joint" in front of the undisputed facts cannot create an antitrust violation.[6]

1. There is no per se claim.

This case began with an allegation of rate-fixing by respondents. The complaint alleged that in 1959 respondents "jointly exacted from

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(Footnote Continued)

petitioner to show cause why a penalty should not be levied against it for filing a frivolous appeal.

6 Throughout the petition, the words "admittedly concerted," "concertedly" or "concerted" have been inserted by petitioner in quotations from the decisions below before every reference to respondents' "refusals to renegotiate" (e.g., Pet., pp. 6, 8, 12). Petitioner also falsely states that respondents have "never denied" collusion, that respondents "assert they were entitled to collude" and that the "District Court did not deny that respondents had conspired" (Pet., pp. 5, 6). As noted, summary judgment was granted precisely because petitioner failed to meet its burden of establishing any genuine issues as to the existence of a conspiracy.

the [petitioner] virtually identical" water supply contracts and "jointly insisted upon prices" (C.R. 46, ¶¶ 15, 15a; Pet.Appx., p. A-7). The evidence, however, is to the contrary: "District [petitioner], not defendants [respondents], insisted that the water contracts be identical at rates set by the District" (Pet.Appx., p. A-9) (emphasis added). Petitioner does not, and cannot, question this or any other portion of the district court's recitation of undisputed facts.

Petitioner faults the district court for not citing this Court's decisions in Catalano, Inc. v. Target Sales, Inc. (1980) 446 U.S. 643 and Arizona v. Maricopa County Medical Society (1982) 457 U.S. 332 (Pet., p. 8). Those decisions, and the other per se cases cited by petitioner, are entirely inapposite. They are examples

of the "archetypal" per se violations involving horizontal agreements among competitors to set future prices (Catalano, 446 U.S. 647).[7] None involved prices long established by contract, let alone prices previously set by the plaintiff in a long-term contract. Here, it is undisputed that petitioner, not respondents, set the rates years before the actions of which it now complains.

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7 In Catalano, the Court held that a horizontal agreement among competitors to stop extending credit in the future was "tantamount to an agreement to eliminate discounts, and thus falls squarely within the traditional per se rule against price fixing" (446 U.S. 648). In Maricopa County, the Court condemned as a per se violation a horizontal agreement among competitors to set maximum future prices. And in Sugar Institute v. United States (1936) 297 U.S. 553, 601-602, the Court held per se unlawful a horizontal agreement to fix future prices in accordance with previously announced prices.

BEST AVA

According to petitioner, respondents were not free to rely on their contractual rates because of United States v. General Motors (1966) 384 U.S. 127. There, this Court found a "classic conspiracy * * * to eliminate a class of competitors by terminating business dealings" (384 U.S. 140). General Motors allegedly conspired with some of its dealers to eliminate other dealers who had supplied price discounters. Here, in contrast, defendants merely relied on their bargained for consideration and chose not to modify their long-term rates. Contract performance cannot be twisted into an antitrust violation.

2. There is no genuine issue under the rule of reason.

The petition is founded upon a fundamental false premise. Petitioner first represents that the "courts below"

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assumed the existence of a conspiracy and held "that respondents' collusion was per se lawful" (Pet., pp. 10, 12). Petitioner then incorrectly concludes that "rule of reason analysis" was "thereby foreclos[ed]" (Pet., p. 10). The district court made no such assumption, and it properly analyzed petitioner's rule of reason claim. After a "thorough survey of the voluminous record" (Pet.Appx., p. A-2), and under the express heading "Rule of Reason Analysis," the district court concluded that there was "no evidence in the record * * * suggesting that L-P and Simpson had an agreement" in restraint of trade (Pet.Appx., p. A-9). Petitioner's mischaracterizations of the

district court's opinion cannot obscure its total failure of proof.[8]

Petitioner conceded on appeal that it "naturally met with both defendants and wrote to both defendants on various subjects over the years" (Appellant's Opening Brief, p. 36). Its representation to this Court that not one "shred of evidence" suggests that it

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8 District misleadingly quotes from F.T.C. v. Indiana Federation of Dentists (1986) ___ U.S. ___, 106 S.Ct. 2009, 2018 that a "refusal to compete with respect to the * * * price term of an agreement" impairs the ability of the marketplace and is thus anticompetitive (Pet., p. 11). In context, however, the Court's remark is directed to an agreement among competitors not to negotiate on price in the absence of a contract. The quote follows the Court's description in Indiana Federation of its holding in National Soc. of Professional Engineers v. U.S. (1978) 435 U.S. 679. The latter decision concerned "an agreement among competitors to refuse to discuss prices with potential customers until after negotiations have resulted in the initial selection of an engineer" (435 U.S. 692).

precipitated communication between respondents on its contract proposals (Pet., p. 15) is belied by its own documents. As summarized above, the undisputed facts show that petitioner insisted on communication between respondents, the very conduct about which it now complains (pp. 4-7, supra).

Finally, petitioner raises a straw man: the defense of a plaintiff's "truly complete involvement and participation in a monopolistic scheme" suggested by Perma Mufflers v. Int. Parts Corp. (1968) 392 U.S. 134, 140. Petitioner deliberately misses the point. The district court noted that it was undisputed that petitioner's insistence on identical contracts and joint negotiations "precipitated joint action" by respondents (Pet., p. 16, quoting Pet.Appx., p. A-9), not that respondents colluded. The district court correctly

held that the undisputed facts raised no genuine issue as to an antitrust violation; thus there was no occasion to consider any affirmative defenses. Indeed, the district court expressly declined to address the "complete involvement" defense (Pet.Appx., p. A-6).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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